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**Senate Bill 413, An Act Concerning the Denial of Prequalification Certificates by the Commissioner of Administrative Services**
**Transportation Committee**
**March 10, 2010**

**AGC of Connecticut Position: Oppose**

The Connecticut Construction Industries Association, Inc. is the most diverse commercial construction industry trade association in Connecticut. Formed over 40 years ago, CCIA is an organization of associations, where all sectors of the commercial construction industry work together to advance and promote their shared interests. CCIA members have a long history of providing quality work for the public benefit.

CCIA is comprised of nine divisions, including the Associated General Contractors of Connecticut, Inc.; The Connecticut Road Builders Association, Inc.; Utility Contractors Association of Connecticut, Inc.; The Connecticut Ready Mixed Concrete Association, Inc.; and Connecticut Asphalt and Aggregate Producers Association. CCIA has more than 350 members statewide, including contractors, subcontractors, suppliers, and professional organizations that service the construction industry.

Associated General Contractors of Connecticut, a division of CCIA, represents commercial, industrial, and institutional construction contractors, subcontractors, material suppliers and professionals serving the construction industry. AGC of Connecticut is the Connecticut chapter of the Associated General Contractors of America, a national contractors trade association.

Senate Bill 413, An Act Concerning the Denial of Prequalification Certificates by the Commissioner of Administrative Services, would authorize the DAS Commissioner to deny a prequalification certificate to any contractor or substantial subcontractor who has submitted to the commissioner, within the preceding three years, four or more written evaluations determined by her to be unsatisfactory. The Commissioner is presently authorized to not issue or renew a prequalification certificate to disqualified contractors or contractors that have a principal or key personnel who has been convicted within five years of acts that could have resulted in disqualification. Additionally, the bill extends liability protections to any person who completes a subcontractor evaluation.

AGC of Connecticut is **opposed** to Senate Bill 413 because, in its present form, it can easily put good contractors that perform quality work for the public out of business.

Even though AGC of Connecticut strongly supports contractor evaluations as an integral part of an effective DAS prequalification system, our association believes that contractors should be afforded the opportunity to test the accuracy of an evaluation, or explain

extenuating circumstances relating to an evaluation before being denied a prequalification certificate.

Simply basing a denial of prequalification on four unsatisfactory evaluations can lead to unintended results. For example, contractor evaluations may be misused as leverage in construction disputes, or to gain an advantage over contractors performing on projects. The parties to construction projects often have differing opinions regarding the interpretation of contract provisions, drawings, and specifications that lead to disputes. It is easy to see how the party in control of an evaluation could use it as leverage to gain an advantage over the contractor to be evaluated on a project.

The consequences of this are staggering for a contractor. Any contractor that is denied a prequalification certificate would effectively be eliminated from contracting.

Additionally, as the attached article, "The Rise of the Performance Evaluation: New Developments in Contractor Challenges to Adverse Evaluations Under the Contract Disputes Act, from the Winter 2010 edition of the American Bar Association publication *The Procurement Lawyer*, indicates, some tribunals have not ordered contracting officers to change unfair or inaccurate contractor performance evaluations. As a result, "contractors have been unable to challenge adverse evaluations based on the merits of those evaluations." Volume 45, Number 2 *The Procurement Lawyer* at 3.

AGC of Connecticut was the initial supporter and advocate for the contractor prequalification program and supports these efforts to improve its effectiveness, however we believe that Senate Bill 413 goes too far and does not provide sufficient opportunity for contractors to test and explain evaluations. Therefore, we respectfully request that the committee not act on the bill.

Please contact John Butts, Executive Director of AGC of Connecticut, or Matthew Hallisey, Director of Government Relations and Legislative Counsel for CCIA, at 860-529-6855, if you have any questions or if you need additional information.

# The Rise of the Performance Evaluation: New Developments in Contractor Challenges to Adverse Evaluations Under the Contract Disputes Act

*By Dorothy E. Terrell and Kathryn T. Muldoon*

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In the mid-1990s, the Federal Acquisition Regulation (FAR) began requiring formal evaluations of contractor performance. Over the years, these evaluations have become an "inherent part of source selection decisions" because procuring agencies are required to review the evaluations as past-performance history when considering contractors for subsequent contract awards.[1] As a result, a negative review is potentially "devastating to a contractor, who may have no opportunity—or very little opportunity—to mitigate the impact that review will have on future awards."[2]

Since the inception of this mandatory performance evaluation system, courts and the boards of contract appeals have questioned whether a contractor challenge to a performance evaluation is a cognizable claim under the Contract Disputes Act (CDA), codified at 41 U.S.C. §§ 601-13. The term "claim" is not defined in the CDA. The FAR, however, defines a claim as:

> [A] written demand or written assertion by one of the contracting parties seeking, *as a matter of right*, the payment of money in a sum certain, *the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.*[3]

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* *"Top Sheet" is used in construction and other fields to denote a condensed overview of essential information about a bid or project. The Construction Division's Top Sheet articles are similarly crafted to be succinct examinations of key aspects of a case, law, or other issue.*

In several recent decisions, the United States Court of Federal Claims (COFC) and the Armed Services Board of Contract Appeals (ASBCA) have addressed challenges to performance evaluations on federal contracts. While the COFC and the ASBCA differ in their views on jurisdictional issues, both tribunals recognize expanded opportunities for contractor challenges to unfair or inaccurate performance ratings.

## Contractor Challenges to Performance Evaluations Based on the Merits: *Konoike Construction* and Its Progeny

Beginning with its decision in *Konoike Construction Co.*[4] in 1991, the ASBCA has consistently held that it does not have jurisdiction over a contractor's claim to set aside a performance rating.[5] In doing so, the board has reasoned that neither the performance evaluation nor the contractor's request for amendment constitutes a CDA claim. In addition, the ASBCA has reasoned that it does not have authority to issue injunctive relief or order specific performance, and therefore cannot compel the contracting officer to change an unfair or inaccurate rating. As a result, contractors have been unable to challenge adverse evaluations based on the merits of those evaluations at the ASBCA.

In *Konoike*, the contractor asked the board to "reverse" a contracting officer's final performance evaluation of unsatisfactory, and enter a rating of satisfactory in its place.[6] The contractor argued that the government's final performance evaluation itself was a government claim that was appealable by the contractor under the CDA. The board disagreed, holding that the performance evaluation was not a claim, because it did not seek, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. Since the board found no underlying claim, it concluded that it did not have jurisdiction.[7]

The ASBCA further held in *Konoike* that even if the performance evaluation were a CDA claim, it was without authority to grant the requested relief, i.e., to order the contracting officer to amend the performance evaluation. Such a request, according to the board, was "in the nature of a request for injunctive relief or specific performance and unavailable from the Board."[8] The board subsequently reached similar conclusions in G. *Bliudzius Contractors*,

*CardioMetrix*, *TLT Construction Co.*, and *Aim Construction*.[9]

In *G. Bliudzius*, the contracting officer issued a final performance evaluation for the contractor with an overall unsatisfactory rating. Unlike *Konoike*, the contractor in *G. Bliudzius* did submit a "claim" requesting that the contracting officer change the final performance rating to satisfactory. The contracting officer denied the "claim" and the contractor appealed the denial to the ASBCA. Citing *Konoike*, the board held that the contractor's request that the contracting officer amend the evaluation was not a CDA claim and, in any event, the relief sought by the contractor was "injunctive relief, which is beyond the scope of remedies" available at the board.[10]

Similarly, in *CardioMetrix*, the contracting officer issued an interim evaluation. The contractor disagreed with the evaluation, and submitted a request that the interim evaluation "be declared invalid and not used for any purpose." The contracting officer responded that the contractor's request was not a CDA claim. The contracting officer did not issue a final decision.[11] The contractor nevertheless appealed, "essentially ask[ing] the Board to change the evaluation." The board cited *Konoike* and *G. Bliudzius* and, going a step further, held that it did not have jurisdiction to grant the relief requested, which "essentially seeks to insert [the Board] in the source selection process."[12]

Likewise in *TLT Construction*, the contracting officer issued an unsatisfactory evaluation of the contractor's performance. The contractor requested that the district engineer review the evaluation. The district engineer responded that the evidence in the contract record justified the contracting officer's evaluation. Thereafter, the contractor filed an appeal with the ASBCA requesting that the contracting officer correct the evaluation.

In an apparent attempt to avoid the fate of contractors before it, the contractor in *TLT Construction* argued that its claim was properly before the board because the government's evaluation violated the terms of the parties' contract. Specifically, the contractor claimed that the government did not adhere to the procedures set forth in the U.S. Army Corps of Engineers Regulations. In its decision, the board did not provide a detailed analysis of the regulations, but instead relied on *Konoike* and its progeny, at the same time extending its prior holdings, as it had done in *CardioMetrix*.

The *TLT Construction* board held that the performance evaluation was "an administrative matter, not a Government claim, and a contractor's request that a contracting officer change an evaluation is not a contractor claim."[13] The ASBCA further held that "performance evaluations, unless specified contractually, are administrative matters over which [the board] lack[s] jurisdiction."[14] The board concluded that it lacked jurisdiction over the appeal because the contractor could not point to any disputed contract term concerning the performance evaluation.[15] As it had done in *Konoike*, the board also concluded that it lacked the authority to issue injunctive relief.[16]

In *Aim Construction*, the contractor sought damages for the "government's failure to act reasonably and in good faith."[17] Among other things, the contractor alleged that the government's issuance of an unsatisfactory performance rating was evidence of bad faith because the government intended it "to create a de facto debarment of Aim." The contractor further alleged that although the government later rescinded the rating, the rating had "severely damaged Aim and caused it to incur substantial damage." Oddly, the ASBCA likened the case to *TLT Construction* and *Konoike*, and held that it lacked jurisdiction to entertain Aim's claim.[18]

## The Court of Federal Claims' Increased Emphasis on Performance Evaluations

The COFC has declined to adopt the reasoning of *Konoike* and its progeny. Instead, that court recognizes that a contractor's challenge to an adverse performance evaluation *is* a CDA claim over which the court has jurisdiction.[19] In addition, the COFC has increasingly recognized the importance of a contractor's performance rating in the procurement process and the right of a contractor to a fair and accurate rating. The COFC has also suggested that an agency should be held accountable for intentionally issuing inaccurate or unfair evaluations and that, depending upon the circumstances, such an evaluation could "constitute a breach of the implied covenant of good faith and fair dealing."[20]

In *Record Steel and Construction, Inc. v. United States*,[21] the government issued the contractor a final evaluation with an overall satisfactory rating and several marginal sub-element ratings. The contractor submitted a written response expressing disagreement with the evaluation and requesting that the government revise the rating. When the government denied that request, the contractor filed a complaint, seeking a declaratory judgment by the COFC that the contracting officer must correct the performance evaluation to accurately reflect the contractor's work on the project.[22]

The COFC in *Record Steel* held that it has jurisdiction to render a judgment on a nonmonetary dispute under the Tucker Act (28 U.S.C. §§ 1346(a), 1491).[23] The court further held that the Tucker Act vests it with jurisdiction to review contractor performance evaluations if the pertinent requirements of the CDA are met, including submission of a CDA claim and a contracting officer decision on that claim.[24] The COFC concluded that the contractor's request constituted a CDA claim, reasoning that the contractor was seeking relief relating to the contract pursuant to a claim of right under FAR 36.201(a)(1) and Defense Federal Acquisition Regulation Supplement (DFARS) 48.236.201(a), and -(c).[25] According to the court, the contracting officer's denial of the request for reconsideration rendered the evaluation a final action and constituted a final decision under the CDA.

The *Record Steel* court expressly rejected the government's argument that because the ASBCA has declined to exercise jurisdiction over review of contractor performance evaluations, so should the COFC. To begin, the court disagreed with the conclusion in *TLT* that the federal regu-

lations do not impose an obligation on the government to complete an evaluation. The court also distinguished the relief available at the COFC from that available at the board. The court ruled that:

> Without opining on the equitable jurisdiction of an agency board, this court has an explicit grant of jurisdiction in the Tucker Act to issue injunctive and declaratory relief in specified areas, and particularly the court "may as an incident of and collateral to any such judgment" [i.e., one rendered under 28 U.S.C. § 1491 (a)], issue orders directing "correction of applicable records" or "remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."[26]

In *BLR Group of America, Inc. v. United States*,[27] the contractor sought a declaratory judgment that its performance evaluation was "false and highly prejudicial," an injunction requiring the government to revise or rescind the final rating, and an assessment of costs.[28] The government challenged the court's jurisdiction on the ground that the contractor had not filed a claim and the contracting officer had not issued a final decision, in violation of the CDA.

Citing *Konoike* and its progeny, the government argued that an erroneous interpretation of the contract by the government is a prerequisite to a contractor's challenge to a performance evaluation, and that otherwise there is no valid CDA claim.[29] The COFC disagreed, holding that a contractor need not assert a specific contractual provision to meet the CDA "matter of right" requirement. According to the court, the contractor need only assert entitlement in reliance on some legal basis.[30]

Similar to the holding in *Record Steel*, the *BLR* court held that a contractor is legally entitled pursuant to the applicable regulations to a performance evaluation, and found that a "logical correlation" to that conclusion was that the contractor is entitled to a "fair and accurate performance evaluation."[31] The court further held the plaintiff's request for a fair and accurate rating was a request for relief related to the contract, and as such constituted a valid claim within the meaning of the CDA. The *BLR* court concluded that the government's denial of the contractor's request provided an appropriate basis for the contractor to appeal to the COFC. The court reasoned that this approach was consistent with the overall jurisdictional scheme of the Tucker Act and with the government procurement process as a whole.

The *BLR* court noted that a contractor has two options for challenging an inaccurate performance evaluation: (1) submit a contract performance claim pursuant to the CDA at the time the government agency issues the performance evaluation; or (2) wait and lodge a protest when the performance evaluation plays a role in an unsuccessful bid on a future contract.[32]

The court pointed out disadvantages of option (2), the bid protest review, by commenting that it is limited to an assessment of the conduct of the government official on the new procurement in evaluating the contractor's past performance. It does not involve review of the merits of the performance evaluation issued on the past contract. Moreover, bid protest review gives "the greatest deference possible" to the contracting officer who evaluates an offeror and its bid.[33] In addition, as compared to bid protests, "CDA claims are typically nondisruptive."[34]

The court further found that:

> The efficiency of the procurement process would be compromised by forcing a contractor to protest an issue that could have been resolved at an earlier time under the CDA. Indeed, to force a wrongly evaluated contractor to defer a challenge to the evaluation until it unsuccessfully bids on a future contract is not only inefficient, but is potentially unfair. The contractor would be tethered to the inaccurate performance evaluation for an unspecified—possibly lengthy—period of time. It is conceivable that by the time the contractor was able to challenge the evaluation, personnel changes and fading memories could hinder the contractor's chances for success. These two factors could be particularly fatal to a contractor's challenge given the heavy burden faced by unsuccessful bidders challenging contract awards. . . . Accordingly, challenges to performance evaluations are best made within the confines of the CDA, thus allowing the contractor and the government to avoid unnecessary and disruptive bid protests.[35]

Thus, the court concluded that a contractor claim under the CDA was the "proper mechanism, and provides the proper jurisdictional predicate to challenge an adverse performance evaluation in the [COFC]."[36]

The *BLR* court addressed but declined to adopt the ASBCA's reasoning in *Konoike*, holding that the issue before the court was distinguishable. Unlike the contractor in *Konoike*, the *BLR* contractor submitted a formal request to the contracting officer to change the performance evaluation. The court concluded that the holdings in *Konoike*'s progeny (e.g., *G. Bliudzius* and *TLT Construction*), that a contractor's request to a contracting officer to change a performance evaluation is not a valid CDA claim, were "unwarranted extension[s]" of the *Konoike* decision.[37] The *BLR* court suggested that later applications of *Konoike* by the board should have been limited to the facts of that case. In other words, the ASBCA's decision in *Konoike* should simply stand for the proposition that a performance evaluation by itself is not a government CDA claim.[38]

On the heels of its decision in *BLR*, the COFC issued its decision in *Todd Construction, L.P. f/k/a, Todd Construction Co. v. United States*.[39] Like the court in *BLR*, the *Todd* court addressed a contractor's allegations that the government issued a performance evaluation that was "substantively erroneous" in violation of applicable procedures.[40] In accord with the decision in *BLR*, the *Todd* court held that the contractor's comments submitted to the contracting officer protesting the negative performance evaluation constituted a CDA claim.[41] Relying on federal and agency regulations pertaining to performance evaluations, the court further held:

> To the extent plaintiff asserts that when the Government prepares a performance evaluation that will be made part of the record upon which its future submissions will be judged, it is entitled to an accurate and fair performance evaluation prepared in accordance with the regulations, it makes that request "as a matter of right."[42]

Next, the court reasoned that the rating "relates to" the contract upon which the evaluation is made:

> If there had been no contract, there would be no evaluations. The subject of the evaluations is the quality of the contractor's performance under the terms of the contract (and, of course, any modifications). As a matter of logic, a performance evaluation relates to the contractor's performance under the contract, in the same way that any evaluation relates to the thing evaluated.[43]

In reaching its decision, the *Todd* court noted "[g]iven the increasing importance of performance reviews and prejudice to contractors from erroneous ratings, there should be some judicial forum available to consider challenges to the fairness and accuracy of evaluations."[44]

In *Todd*, the COFC again declined to adopt the reasoning of the ASBCA in *Konoike* and held that the contractor's claim for a fair and accurate rating was a CDA claim. The court identified a number of unanswered questions in the analysis. The court questioned which remedies were available at the COFC in light of the board's rationale in *Konoike*, i.e., that injunctive relief and/or specific performance are not available at the ASBCA. The court held that it required further briefing on the issue of remedies available at the COFC on the contractor's claim.

The *Todd* court noted that it did have authority to provide declaratory relief. It remained to be determined whether a declaration would resolve the dispute and/or provide appropriate relief.[45] In addition, the court requested further briefing from the parties regarding the appropriate standard of review. As a result, the court deferred ruling on the government's motion to dismiss pending further briefing.[46] Thereafter, the parties submitted supplemental briefings to address the court's questions.

On July 22, 2009, the *Todd* court issued an opinion on the government's motion to dismiss for failure to state a claim upon which relief could be granted.[47] With respect to the question of available relief, the COFC affirmed that it does not have authority to issue injunctive relief but does have authority to issue declaratory judgments. The court recognized that it will "narrowly" review a performance evaluation because of its inherently subjective nature:

> The choice of a particular rating to assign is necessarily subjective and is within the sole purview of the Government. Thus, the production of an accurate and fair performance evaluation rating requires the exercise of the contracting officer's judgment, and "when the parties to a contract vest one party with the discretion to make a critical factual determination under the contract, this court narrowly reviews that determination to ascertain whether that discretion was arbitrarily or capriciously exercised."[48]

Regarding the standard of review, however, the court reasoned that:

> Despite the discretionary nature of the assignment of a performance evaluation rating, the exercise of that discretion must be reasonable. Thus, the court will review the "accuracy" and "fairness" of a performance evaluation rating to determine whether "the discretion employed in making the decision is abused, for example, if the decision was arbitrary or capricious". . . .Thus, the Court agrees with defendant that it would be improper for the Court to conduct a new evaluation . . . and with, respect to whether the performance evaluation was fair and accurate, that the contractor is entitled only to a determination whether the agency's choice of a "fair and accurate" rating constituted an abuse of discretion.[49]

The court concluded,

> Under [the court's] remand authority [in 28 U.S.C. § 1491(a)(2)], this Court can review the procedural propriety of the manner in which the performance evaluation was determined and, if it finds inadequacies, remand to the agency with a description of the procedural deficiencies found by the Court and direction as to how to remedy them. The Court can also review whether the agency abused its discretion in determining that the assigned performance rating was "accurate" and "fair" and, if it finds an abuse of discretion, can remand to the agency for further consideration. The Court contemplates that such a remand would involve a "proper and just" direction that the agency re-examine its rating and either build a proper record for the rating it assigned or assign a rating that is supported by the record. The Court does not possess the power to mandate that upon remand the agency assign a particular rating, withdraw a rating, or remove a rating from the prescribed database.[50]

The *Todd* court, however, held that based on recent U.S. Supreme Court decisions:

> Conclusory assertions that an unsatisfactory evaluation was an abuse of discretion or that procedures were not followed constitute a "formulaic recitation of the elements of a cause of action" that does not suffice to survive a motion to dismiss.[51]

The court found that Todd Construction's complaint did not contain sufficient factual allegations to suggest entitlement to remand. Nevertheless, the court believed that it would be unfair to "victimize" the contractor by scrutiny of its complaint in light of the recent Supreme Court decisions that were issued after the contractor had filed its complaint.[52] Therefore, the COFC held that it would defer ruling on the government's motion to dismiss for failure to state a claim to allow the contractor to file an amended complaint.

The court also expressed hope that its decision would

> clarify the sources and extent of the Court's authority to review performance evaluations, the scope of and standards applicable to such review, and the remedies available in this Court under its remand power when a contractor successfully challenges a performance evaluation.[53]

## Contractor Challenges to a Performance Evaluation Based on an Agreement for a Particular Rating

As discussed above, the ASBCA has consistently held that it does not have jurisdiction over a contractor challenge to the merits of a performance evaluation, or over a contractor's request to reverse or correct an evaluation. Notwithstanding that settled law, the board has carved out an expanded basis for jurisdiction over challenges to a performance evaluation when a contractor and the government enter into an agreement under which the contractor is entitled to a particular evaluation. Pursuant to its authority to determine the rights and obligations of the parties under disputed terms of a contract, the board has held that it has jurisdiction to determine and declare whether the government's utilization of a particular rating violates the terms of an agreement.[54] Under such circumstances, however, the contractor's relief at the ASBCA is limited to a declaratory judgment in which the board determines and declares the contractor's rights under the agreement.[55]

In the seminal case on this issue, *Coast Canvas*,[56] the parties had entered into a settlement agreement that included broad release language regarding performance delay. The settlement agreement was incorporated into a contract modification. Subsequently, the government issued an interim unsatisfactory rating based on contractor performance delay. The contractor submitted a claim to the contracting officer, requesting, among other things, amendment of the rating.

The ASBCA in *Coast Canvas* held that it had authority to adjudicate the appeal pursuant to its "jurisdiction to determine the rights and obligations of the parties under disputed terms of a contract which includes contract modifications."[57] The board held that the parties intended the release language to put to rest all the parties' disputes regarding performance delay under the contract. The board therefore "determine[d] and declare[d] that the utilization by the Government of an unsatisfactory rating premised upon such performance delay would be violative of [the] Contract Modification."[58]

In its later decisions in *Konoike* and *TLT Construction*, the board affirmed its holding in *Coast Canvas* and recognized that it does have authority to issue declaratory relief such that it can determine the rights and obligations of the parties under disputed terms of a contract, which includes contract modifications and settlement agreements. In *Konoike*, the board characterized the declaratory judgment in *Coast Canvas* as the board's "urg[ing] the contracting officer not to amend the performance history card on the basis that an amendment to the performance history card, after the execution of the modification, was a violation of the terms of the modification."[59] The board in *Konoike* and *TLT Construction*, however, distinguished *Coast Canvas* on the basis that the parties in *Konoike* and *TLT Construction* had not entered into an agreement relating to the performance rating.[60]

Recently, in *Sundt Construction*,[61] the ASBCA again upheld its decision in *Coast Canvas*. In *Sundt Construction*, the contractor presented evidence that the parties had entered into a settlement agreement whereby, inter alia, the government would issue the contractor an overall satisfactory performance rating. The board found that the facts presented in *Sundt Construction* were similar to those in *Coast Canvas* and concluded:

> The contracting officer affidavit provided by appellant is persuasive enough to establish that some type of agreement was reached. Appellant's claim asks for recognition of the agreement under the contract. Accordingly, we have jurisdiction to determine the rights and obligations of the parties under disputed terms of a contract.[62]

In effect, the board recognized in *Coast Canvas*, *Konoike*, *TLT Construction*, and *Sundt Construction* that the government and a contractor may enter into an agreement involving the contractor's performance evaluation, and that the board has authority to determine and declare if an adverse evaluation violates that agreement.

## Conclusion

In order to challenge a performance evaluation at either the ASBCA or the COFC, a CDA claim must be made. Both the board and the COFC are in agreement that the government's final performance evaluation standing alone is not a CDA claim.[63] The COFC has, however, recognized jurisdiction over challenges by contractors concerning the merits of a performance evaluation. In so doing, the COFC has expressly held that a CDA claim is the "proper mechanism" and "jurisdictional predicate" for challenging an adverse performance evaluation in the COFC.[64] Unlike the COFC, the ASBCA has declined to recognize its jurisdiction over a challenge to the merits of a rating or a request to change the rating. The board has, however, recognized its jurisdiction to "determine and declare" that a particular rating is in violation of an agreement of the parties.[65]

## Endnotes

1. Todd Construction, L.P. f/k/a, Todd Construction Co. v. United States, 85 Fed. Cl. 34, 41 (2008) (citing Jonathan Cain, *Infotech and the Law: Negative Performance Review? You Now Have Relief*, WASH. TECH., Dec. 31, 2004 ("It is remarkable, then, that given the importance of these evaluations, contractors have been powerless to challenge unfair or punitive reviews."). *See also* DFARS 236.201; Procedures, Guidance and Information (PGI) 236.201(c); FAR 15.305(a)(2)(i).
2. *Todd Construction*, 85 Fed. Cl. at 42.
3. FAR 52.233-1(c) (emphasis added). *See also* FAR 33.201.
4. *Konoike Constr. Co.*, ASBCA No. 40910, July, 2, 1991, 91-3 BCA ¶ 24,170.
5. *Id.* at 120,908; *Aim Constr.*, ASBCA No. 52540, Dec. 28, 2006,

07-1 BCA ¶ 33466; *TLT Constr. Corp.*, ASBCA No. 53,769, Aug. 26, 2002, 02-2 BCA ¶ 31,969; *CardioMetrix*, ASBCA No. 50897, Oct. 27, 1997, 97-2 BCA ¶ 29,319; *G. Bliudzius Contractors, Inc.*, ASBCA No. 42365, Nov. 22, 1991, 92-1 BCA ¶ 24,605.

6. *Konoike*, 91-3 BCA at 120,907.
7. *Id.* at 120,908.
8. *Id.*
9. *Aim Construction*; *TLT Construction*; *CardioMetrix*; *G. Bliudzius*.
10. *G. Bliudzius*, 92-1 BCA at 122,751.
11. *See* FAR 33.211 (elements of contracting officer final decision).
12. *CardioMetrix*, 97-2 BCA at 145,787.
13. *TLT Construction*.
14. *Id.* at 157,912.
15. *Id.*
16. *Id.*
17. *Aim Construction*, 07-1 BCA at 165,915.
18. *Id.*
19. *Todd Construction*, 85 Fed. Cl. at 43 (citing FAR 36.201; Army Corps of Engineers Regulation 415-1-17(5)(c)(1)); BLR Group of America, Inc. v. United States, 84 Fed. Cl. 634, 641 (2008) (citing FAR 42.1502(a); AFFARS 5342.1503; CPARS Policy Guide); Record Steel and Construction, Inc. v. United States, 62 Fed Cl. 508, 519 (2004) (citing FAR 36.201(a)(1); DFARS 236.201(a), -(c)).
20. *See BLR*, 84 Fed. Cl. at 641, n.8.
21. 62 Fed. Cl. 508.
22. *Id.* at 510.
23. *Id.* at 518 (citing 28 U.S.C. § 1491(a)(2)).
24. *Id.* at 520.
25. *Id.* at 519. Among other things, FAR 36.201(a)(1) and DFARS 236.201(a), -(c) require contracting agencies to prepare performance evaluations for construction contracts exceeding $500,000 in value.
26. 62 Fed. Cl. at 520 (citing 28 U.S.C. § 1491(a)(2)).
27. 84 Fed. Cl. 634 (2008).
28. *Id.* at 637.
29. *Id.* at 640.



30. *Id.* at 641.
31. *Id.*
32. *BLR*, 84 Fed. Cl. at 647.
33. Westech Int'l, Inc. v. United States, 79 Fed. Cl. 272, 293-94 (2007). *See also* Bannum, Inc. v. United States, 60 Fed. Cl. 718, 729 (2004), *rev'd on other grounds*, 404 F.3d 1346 (Fed. Cir. 2005); Precision Images, LLC v. United States, 79 Fed. Cl. 598, 624-25 (2007) (offeror must demonstrate specific prejudice resulting from an erroneous past performance rating).
34. *BLR*, 84 Fed. Cl. at 647.
35. *Id.* at 647.
36. *Id.* at 647-48.
37. *Id.* at 647 (citing *Konoike*, 91-3 BCA at 120,908). *See also TLT Construction*; *G. Bliudzius*.
38. 84 Fed. Cl. at 645-46.
39. *Todd Construction*, 85 Fed. Cl. at 38.
40. *Id.*
41. *Id.* at 45.
42. *Id.* at 43 (citing FAR 36.201; Army Corps of Engineers Regulation 415-1-17(5)(c)(1)).
43. 85 Fed. Cl. at 45.
44. *Id.*
45. 85 Fed. Cl. at 47. The *Todd* court suggests that the court's jurisdiction over the contractor's claim in *Record Steel* was founded on the first sentence of 28 U.S.C. § 1491(a)(2), which states in pertinent part: "To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing . . . correction of applicable records. . . ." 85 Fed. Cl. at 48. The *Record Steel* court noted that the contractor argued in the alternative that that sentence provided the COFC with jurisdiction over the contractor's claim. However, the court in *Record Steel* specifically stated that the third sentence of section 1491(a)(2) provided a sufficient basis for jurisdiction: "The Court of Federal Claims shall have jurisdiction upon any claim by . . . a contractor arising under section 10(a)(1) of the [CDA] . . . including . . . other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act." The *Record Steel* court declined to express an opinion as to whether the first sentence provided an alternate avenue for jurisdiction. *See* 62 Fed Cl. at 520.
46. *Todd Construction*, 85 Fed. Cl. at 47.
47. Todd Construction, L.P., *f/k/a*, Todd Constr. Co. v. United States, No. 07-324 C, 2009 U.S. Claims LEXIS 257 (Fed. Cl. July 22, 2009).
48. *Id.* at *37-38.
49. *Id.* at *40-41.
50. *Id.* at *42-43.
51. *Id.* at *44-45 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 561 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).
52. 2009 U.S. Claims LEXIS 257 at *45.
53. *Id.* at *45-46.
54. *Sundt Constr., Inc.*, ASBCA No. 56293, Feb. 24, 2009, 09-1 BCA ¶ 34,084; Donald M. Lake, d/b/a *Shady Cover Resort & Marina*, ASBCA No. 54422, Mar. 23, 2005, 05-1 BCA ¶ 32,920 at 163,071; *TLT Construction*; *Konoike*, 91-3 BCA at 120,908; *Coast Canvas Products II Co., Inc.*, ASBCA No. 31699, Mar. 3, 1987, 87-1 BCA ¶ 19,678 at 99,608.
55. *Coast Canvas*.
56. *Id.*
57. *Id.*, 87-1 BCA at 99,609.
58. *Id.*
59. *Konoike*, 91-3 BCA at 120,908.
60. *TLT Construction*, 02-2 BCA at 157,913.
61. ASBCA No. 56293, Feb. 24, 2009, 09-1 BCA ¶ 34,084.
62. *Id.*
63. *See Konoike*.
64. *BLR*, 84 Fed. Cl. at 647-48.
65. *Sundt Construction*; *Donald M. Lake*, 05-1 BCA at 163,071; *TLT Construction*; *Konoike*, 91-3 BCA at 120,908; *Coast Canvas*, 87-1 BCA at 99,608.